No. 339

In the Supreme Court of the United States

October Term 1923

SOUTHERN UTILITIES COMPANY,
Petitioner,

vs.

CITY OF PALATKA, FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND BRIEF FOR PETITIONER IN SUPPORT THEREOF

J. T. G. CRAWFORD,
WM. B. CRAWFORD,
Counsel for Petitioner.

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SOUTHERN UTILITIES COMPANY, a corporation, *Petitioner,*

vs.

CITY OF PALATKA, a municipal corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable *The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, SOUTHERN UTILITIES COMPANY, a corporation of Florida, respectfully shows:

1. In 1914 the respondent granted to the petitioner a non-exclusive franchise to supply electric current to the respondent and its inhabitants, for thirty years, at a specified maximum rate.

2. Finding said rate inadequate to yield any return, due to changed economic conditions brought about by the late war, the petitioner put an increased rate into effect.

3. The respondent then applied to the appropriate state court for a mandatory injunction upon the theory that the rate provision of the franchise amounted to a contract obligation.

4. The petitioner justified by pleading in defense that under section 30 of article 16 of the state constitution there was no mutual obligation respecting the specified rate, and that the enforcement of the injunction would result in (a) the confiscation of its property without compensation, and (b) the deprivation of its property without due process of law, and (c) the denial to it of the equal protection of the laws.

5. The specified maximum rate is admitted on the record to be confiscatory.

6. A permanent injunction was granted by the trial court, and, upon appeal, was affirmed by the Supreme Court of Florida.

7. The Supreme Court of Florida is the state court of last resort.

8. The effect of the cited provision of the state constitution is to irrevocably vest in the legislature the continuing power to reduce or increase rates for services of a public nature *notwithstanding any contract fixing such rates.* Franchise rates for water were reduced in *Tampa Waterworks Company v. Tampa,* 45 Fla. 600—affirmed by this Court 199 U. S. 241. Franchise rates for telephones were increased in *Brooksville v. Florida Telephone Com-*

pany, 81 Fla. 436. Franchise rates for street car fares were increased in *Triay v. Burr*, 79 Fla. 290.

9. The solitary distinguishing fact between the foregoing cases and the instant case is that in those cases the legislature had delegated to some governmental agency the power to *regulate* the rates involved, while here there has been no such delegation.

10. The petitioner's proposition is that if the rate provision of the franchise is not a contract obligation protected from impairment by the legislature directly, or through delegation to an agency, of its regulatory power, then mutuality of obligation is lacking and such rate cannot be enforced to the prejudice of the petitioner in its constitutional rights seasonably pleaded.

11. The case presents a question of vital importance to the public utility companies in Florida supplying electricity and gas to municipalities, and to the municipalities and their inhabitants being supplied, as there has been no general legislative regulation, or delegation of power to regulate, such rates. As the petitioner is now being compelled to supply its product at a loss because of a franchise rate fixed in an era of low costs, so will the municipalities and their inhabitants be compelled indefinitely to pay rates fixed in the present era of high costs.

12. The decision of the Supreme Court of Florida is essentially rested upon the fictitious issue of the *exercise* or *non-exercise* of the admitted irre-

vocable governmental power to regulate *notwithstanding a contract.*

13. Unless the distinction pointed out in paragraph 9 above is sound, then the decision of the Supreme Court of Florida is in conflict with the decision of the Circuit Court of Appeals for the Circuit in which Florida is situated, and with the decisions of this Court. *City of New Orleans v. O'Keefe* (C. C. A. Fifth Circuit), 280 Fed. 92; *Tampa Waterworks Co. v. Tampa,* 199 U. S. 241; *Southern Iowa Electric Co. v. Chariton,* 255 U. S. 539; *San Antonio v. San Antonio Public Service Co.,* 255 U. S. 547; *Ortega Company v. Triay, receiver,* not yet officially reported. The said decision is likewise in conflict with the decision of the United States District Court for the District in which the litigation arises. *Southern Utilities Co. v. Palatka,* see copy of unreported opinion appended hereto.

14. The petitioner, in the adjoined brief, has more particularly elaborated its contentions.

15. As part of this application there is exhibited a certified copy of the record, including all the proceedings in the Supreme Court of Florida.

WHEREFORE, the petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court, directed to the Supreme Court of the State of Florida, sitting at Tallahassee, Florida, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all the proceedings of said Su-

preme Court of Florida had in the said cause, to the end that said cause may be reviewed and determined by this court as provided by law, and that said judgment of said Supreme Court of Florida be reversed, and for such further relief as may seem proper.

And your petitioner will ever pray.

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Counsel for Petitioner.

STATE OF FLORIDA,
DUVAL COUNTY.

J. T. G. CRAWFORD, being first duly sworn, says that he is one of counsel for Southern Utilities Company, the petitioner; that he prepared the foregoing petition, and that he verily believes that the allegations thereof are true.

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Sworn to and subscribed before me this..... day of March, A. D. 1924.

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Notary Public State of Florida.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

SOUTHERN UTILITIES COMPANY
vs.
CITY OF PALATKA, et al.

CALL, DISTRICT JUDGE.

This cause comes on for a hearing upon the application of the complainant for a temporary restraining order, upon the bill of complaint, answer thereto and the exhibits made a part of each pleading.

The theory of the bill is that the present rate of remuneration allowed by the ordinance for furnishing gas to its patrons in the City of Palatka is confiscatory.

The answer relies in one aspect on the claim that the ordinance fixing the rates is a contract, and therefore it is of no moment whether the rate is confiscatory or not.

The Constitution of the State of Florida, Sec. 30, Art. XVI, places the power to fix rates in the Legislature. As decided in the Tampa Water Works case in 45th Florida, the Legislature may delegate this power to a municipality, but then it is subject to the power vested in the Legislature by this Section, and the act of either Legislature or Common Council is not binding upon a subsequent body. Therefore the contract idea is untenable. In the case of the City of Palatka the power to fix the rates

for furnishing gas has not been delegated by the legislature. This brings this case clearly with the principles decided by the Supreme Court of the United States in several cases decided on April 11th, 1921, advance sheets May 15, 1921, pages 514 and 518.

The answer denies that the rates are confiscatory and sets up facts which if established at the hearing would result in a denial of permanent injunction, but viewing the application in the light as to which of the parties would be most damaged by a granting or refusal of the order sought, I think undoubtedly the complainant would be the greater sufferer, in that in the event the complainant should prevail there would be no way it could recover the compensation over and above the rate allowed by the ordinance, whereas, on the other hand, should the defendant prevail, the sum collected over and above the rate allowed by the ordinance could be easily collected from the bond which will be required from the complainant on the issuance of the temporary injunction.

It will be ordered that the temporary injunction issue as prayed, upon the complainant giving a bond with sufficient sureties to be approved by the Clerk of this Court in the penal sum of ten thousand dollars ($10,000.00), conditioned that the complainant shall keep a correct set of books, showing all amounts received for furnishing gas to the consumers in Palatka, Florida, from whom received, and date of the receipt of the amounts, and shall pay all costs and damages which may be suffered by the defendants herein, or either of them, and to repay to each

of the consumers of gas in the City of Palatka, Florida, any amounts which said consumers shall have paid to complainant over and above the rate allowed by the ordinance, in the event such rate shall be found to be reasonable.

(Signed) R. M. CALL,
Judge.

At Jacksonville, Florida, this December 17th, 1921.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

SOUTHERN UTILITIES COMPANY, a corporation, *Petitioner,*
vs.
CITY OF PALATKA, a municipal corporation, *Respondent.*

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

In support of the foregoing petition we refer to the statement of this Court in *Southern Iowa Electric Co. v. Chariton,* 225 U. S. 539, that:

> "Two propositions are indisputable:
>
> "(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract,

and therefore the question of whether such rates are confiscatory becomes immaterial."

The petitioner's contention is that by reason of Section 30 of Article XVI of the Florida Constitution, Florida falls within the first stated proposition.

The provision in question is as follows:

> "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

We point out that notwithstanding franchise contracts fixing rates, the Florida Supreme Court has used this constitutional provision in justification of both lowering and raising such rates. Cases cited in paragraph 8 of the petition.

A reading of the opinion of the Florida Supreme Court in this case is conclusively convincing that if the respondent, or any other agency of the legislature, had been granted power to regulate the rate in question, the petitioner could get relief from the admitted confiscation of its property. In other words, that the contract would not then bind the

petitioner to continue its service at confiscatory rates.

It is thus demonstrated that petitioner's fundamental rights are defeated by the mere failure of the legislature to exercise, or to delegate, its power to regulate. The answer made by the Supreme Court of Florida to this statement—that petitioner is bound by a valid contract—is unconvincing and unreasonable. See grounds 1 and 3 of motion for rehearing, record pages 81, 83. If there is a mutual contract obligation here, then there was an identical obligation in the cases referred to, where the rates were decreased, and increased.

Judge Call expresses our contention thus:

> "The answer relies, in one aspect, on the claim that the ordinance fixing the rates is a contract, and therefore, it is of no moment whether the rate is confiscatory or not. The Constitution of the State of Florida, Sec. 30, Art. XVI, places the power to fix rates in the legislature. As decided in the Tampa Water Works case in 45th Florida, the legislature may delegate this power to a municipality, but then it is subject to the power vested in the legislature by this section, and the act of either legislature or common council is not binding upon a subsequent body. Therefore the contract idea is untenable."

It cannot be disputed that under the Constitution

of Florida the power to regulate is in the government at all times. The circumstance that the power may be exercised by one governmental agency or another, or may not be exercised at all, ought not, in reason, control the question whether the franchise provision fixing rates is a contract obligation. It is quite clear that the Florida Supreme Court is committed unmistakably to the proposition that the power to regulate cannot be defeated by contract. Can that be admitted without definitely placing Florida within the rule of proposition (a) as stated by this Court, and as definitely taking Florida out of the rule of proposition (b).

The holding of the Supreme Court of Florida in this case amounts to this: that a rate fixed in a franchise is a contract obligation or is not a contract obligation, to be determined by the action or inaction of the government in the exercise of its power to regulate.

To procure uniformity of decision, to protect large property rights from confiscation, to secure the inhabitants of many cities and towns in Florida in their right to purchase public services at reasonable rates, and for other apparent reasons, it is most respectfully submitted that the decision of the Florida Supreme Court should be reviewed by this Court.

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Counsel for Petitioner.